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Guest Workers: New Solution or New Problem?

Philip Martin[†]

The world's population in 2006 was 6.555 billion.¹ Globally, the average woman has 2.7 children, but fertility rates vary from a high of 7.9 children per woman in Niger to a low of 1.3 in European countries such as Spain and Russia.² Virtually all of the annual 79 million person increase in global population is in developing countries.³

About 47 percent of the world's population, and half of the population in most countries, is in the labor force.⁴ This makes the global labor force 3.1 billion.⁵ The United States, which has 302 million residents in 2007, has 153 million workers in the labor force,⁶ or 51 percent of the population.⁷ The distributions of the world's workers and the world's economic output, however, are strikingly different. About 84 percent of the world's workers are in low and middle-income countries, while 80 percent of the world's \$40 trillion Gross National Income ("GNI") accrued to the high-income countries⁸ with 16 percent of the world's workers in 2005.⁹

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¹ Population Reference Bureau, *2006 World Population Data Sheet* 5 (2006), available at <<http://www.prb.org/pdf06/06WorldDataSheet.pdf>> (last visited on Feb 6, 2007).

² Id at 5, 10.

³ Id at 5.

⁴ See World Bank, *2006 World Development Indicators* 22, 52, available online at <<http://devdata.worldbank.org/wdi2006/contents/index2.htm>> (last visited July 16, 2007).

⁵ International Labour Organization Bureau of Statistics, *LABORSTA Database of Labour Statistics* (2006), available at <<http://laborsta.ilo.org/cgi-bin/brokerv8.exe>> (last visited July 16, 2007).

⁶ Bureau of Labor Statistics, *Employment Situation Summary*, available at <<http://www.bls.gov/news.release/empsit.nr0.htm>> (last visited July 16, 2007).

⁷ U.S. Census Bureau, *Population Finder*, available at <http://factfinder.census.gov/servlet/SAFFPopulation?_submenuId=population_0&_sse=on> (last visited July 16, 2007) (declaring the U.S. population in 2006 was 299,398,484).

⁸ The twenty-seven high-income countries include most Organisation for Economic Co-operation and Development ("OECD") countries as well as oil exporters Kuwait, Saudi

The gap in average per-capita incomes between high-income and low- and middle-income countries is large. In 2004, average global per capita GNI was \$6,329, and ranged from an average \$32,112 in high-income countries to \$1,502 in low- and middle-income countries, a 21–1 difference.¹⁰ This wage gap between high and low-income countries, which has not changed in the past quarter century, encourages people—especially the young—to cross national borders in search of higher wages and more economic opportunities.

Migration is an age-old response to differences in economic opportunity, security, and other factors, but international migration over regulated national borders is relatively recent. There were 43 generally recognized countries in the year 1900,¹¹ versus almost 200 today.¹² The number of international migrants, 191 million in 2005,¹³ has doubled in the past two decades in four distinct flows. Some sixty-two million migrants have moved from a developing to a developed country (“south to north”), sixty-one million from a developing country to another developing country (“south to south”), fifty-three million from a developed country to another developed country (“north to north”), and fourteen million from a developed country to a developing country (“north to south”).¹⁴

Arabia, UAE, Israel, Korea, and Singapore.

⁹ World Bank, *2006 World Development Indicators* at 22, 52 (cited in note 4). The World Bank puts the global labor force at slightly less than 3 billion in 2004, including almost 2.5 billion in low- and middle-income countries and approximately 490 million in 28 high-income countries. The International Labor Organization (“ILO”) puts the economically active population of persons 15 to 64 at 3.1 billion in 2004. ILO Bureau of Statistics, *LABORSTA Database of Labour Statistics* (cited in note 5). The World Bank put GNI at \$40.281 trillion, including \$32.245 trillion or 80 percent in high-income countries. See World Bank, *2006 World Development Indicators* at 22 (cited in note 4). For purchasing power parity (“PPP”), which is GNI adjusted for the lower cost of living in low and middle-income countries, world GNI was \$56.289 trillion, including 55 percent in the high-income countries. *Id.*

¹⁰ World Bank, *2006 World Development Indicators* at 22 (cited in note 4). At PPP, average per capita GNI was \$8,844, with \$31,009 in high-income countries and \$4,726 in low and middle-income countries, a 6.6 to 1 difference. *Id.*

¹¹ Philip L. Martin and Elizabeth Midgley, *Immigration: Shaping and Reshaping America*, 61 Population Reference Bureau (December 2006) (describing the history of immigration patterns in the U.S.).

¹² There were 43 generally recognized nation-states in 1900 and 193 independent states in 2007. See Central Intelligence Agency, *World Fact Book*, available at <<https://www.cia.gov/cia/publications/factbook/geos/xx.html>> (last updated June 14, 2007).

¹³ United Nations, *Report of the Secretary-General on International Migration* 12 (May 18, 2006), available at <http://www.old.iom.int//DOCUMENTS/OFFICIALTXT/EN/A_60_871_EN.pdf> (last visited Apr 10, 2007).

¹⁴ *Id.* These are estimates of the total number of migrants present in a particular area in 2005, meaning that migrants may have arrived recently or long ago. Personal

Half of these migrants are in the labor force of the destination area, making the sixty million migrant workers in high-income countries an average 12 percent of their labor forces.¹⁵ The thirty-one million migrant workers from developing countries in developed countries (half of sixty-two million) are different from the workers they join abroad and those left behind at home. Globally, 40 percent of the world's workers are employed in agriculture, 20 percent in industry and construction, and 40 percent in services,¹⁶ and developing country migrants are drawn from societies that have this 40-20-40 distribution of workers. The industrial countries to which migrants move have about 3 percent of their workers employed in agriculture, 25 percent in industry, and 72 percent in services.¹⁷

Migrant workers from developing countries who are in industrial countries have a labor force distribution unlike that of sending or receiving countries. About 10 percent are employed in agriculture, 40 percent in industry and construction, and 50 percent in services,¹⁸ reflecting a tendency of three types of employers in industrial countries to request migrant workers: (1) those in sunset industries such as agriculture and light manufacturing such as sewing; (2) those in industries that produce products that are difficult to trade over national borders, such as construction; and (3) a wide range of services that are delivered on site, from janitorial to health care services.¹⁹

Migrant workers from developing countries in industrial countries also have personal characteristics that are different from the average populations of sending and receiving countries. The best single determinant of individual earnings in industrial countries is years of education.²⁰ In most developing countries,

communication, UN Population Division.

¹⁵ See International Labour Office, *Towards a Fair Deal for Migrant Workers in the Global Economy* (2004).

¹⁶ ILO Bureau of Statistics, *LABORSTA Database of Labour Statistics* (cited in note 5).

¹⁷ Consider Organisation for Economic Co-operation and Development, *OECD in Figures* (2005), available at <http://www.oecd.org/document/62/0,2340,en_2649_201185_2345918_1_1_1_1,00.html> (last visited Feb 10, 2007).

¹⁸ OECD, *International Migration Outlook* 57 (2006), available at <http://www.oecd.org/document/6/0,2340,en_2649_33931_36770438_1_1_1_1,00.html> (last visited Feb 10, 2007).

¹⁹ Id.

²⁰

[T]he accumulation of a tremendous amount of circumstantial evidence testifying to the economic importance of human capital, especially of education. Probably the most impressive piece of evidence is that more highly educated

the distribution of adults by years of education has a pyramid shape, with a few well-educated persons on top and most workers at the bottom, usually having less than a secondary school certificate or high school diploma.²¹

Native-born adults in high-income countries have a diamond shape when arrayed by years of education.²² About 25 percent have a college degree, 60 percent have a secondary school certificate, and 15 percent have less than a secondary certificate or high-school diploma.²³ Migrants from developing countries in industrial countries are different from adults at home and abroad, forming more of an hourglass or barbell shape when arrayed by years of education.²⁴ Some 35 to 40 percent have a college degree, 25 percent a secondary school certificate, and 35 percent less than a high-school diploma.²⁵ International migration from developing to industrial countries thus takes persons from the top and bottom of a pyramid distribution and adds them to the top and bottom of a diamond-shaped distribution.

The Global Commission on International Migration ("GCIM"), the World Trade Organization's General Agreement on Trade in Services ("GATS") Mode 4 negotiations, and voices in both developing and industrial countries are calling for more workers to cross national borders to generate so-called win-win-win outcomes.²⁶ Under this scenario, migrants win by earning

and skilled persons almost always tend to earn more than others. This is true of developed countries as different as the United States and the [then] Soviet Union, or underdeveloped countries as different as India and Cuba, and of the United States one hundred years ago as well as today.

Gary Becker, *Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education* 12 (Chicago 1993).

²¹ Martin and Midgley, *Immigration: Shaping and Reshaping America* at 24 (cited in note 11).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Martin and Midgley, *Immigration: Shaping and Reshaping America* at 24 (cited in note 11).

²⁶ Joint IOM/World Bank/WTO Seminar, *Managing the movement of People: what can be learned for Mode 4 of the GATS?*, Geneva, 4–5 October 2004, program presentation schedule available at <http://www.wto.org/english/tratop_e/serv_e/sem_oct04_e/sem_oct04_e.htm> (last visited Apr 12, 2007) (discussing issues of GATS Mode 4 implementation); World Trade Organization, *Workshop on Domestic Regulation*, 29–30 March 2004, available at <http://www.wto.org/english/tratop_e/serv_e/workshop_march04_e/workshop_march04_e.htm> (last visited Apr 12, 2007) (stating purpose of the workshop was to "bring together and inform regulators, trade negotiators, and other relevant officials"); Joint WTO-World Bank Symposium, *Movement of natural persons (mode 4) under the GATS*, Geneva, 11–12 April 2002, available at <http://www.wto.org/english/tratop_e/serv_e/symp_mov_natur_perso_april02_e.htm> (last visited Apr 12, 2007) (providing "a

higher wages, receiving countries win with additional workers who expand employment and economic output, and sending countries win via remittances and the return of workers who gained skills abroad.²⁷ Economic theory and experience confirm that moving workers from developing to developed countries benefits migrants, who often take enormous risks to cross borders. Moving workers from lower to higher wage areas also creates small net economic benefits in receiving countries, largely because the migrants hold down wages and prices.²⁸ For the United States in the mid-1990s, a National Research Council report estimated the net economic benefits of immigration to be between \$1 billion and \$10 billion, meaning that the United States economic output was this much higher because of immigration.²⁹ Proponents of more immigration stressed the positive economic benefits of immigrants; opponents emphasized that an \$8 trillion economy expanding by 3 percent grows by \$240 billion a year, or \$10 billion in two weeks, meaning that the overall gains from immigration were fairly low.³⁰

The new twist is the argument that developing countries benefit by sending workers abroad. The press release accompanying the World Bank's Global Economic Prospects ("GEP") report for 2006 argued that more "managed migration programs, including temporary work visas for low-skilled migrants in industrial countries . . . would contribute to significant reductions in poverty in migrant sending countries, among the migrants themselves, their families and, as remittances increase, in the broader community."³¹ The GCIM recommended that "States and the pri-

platform for information exchange and discussion on different aspects of mode 4 trade").

²⁷ Some developing countries cite the dangers of a brain drain, and some have asked for compensation from industrial countries that accept their nurses. Celia Dugger, *Africa Needs a Million More Health Care Workers, Report Says*, NY Times A27 (Nov 26, 2004) (noting the Joint Learning Initiative's call for the creation of an "education fund" to pay for the education of tens of thousands of health workers). Some economists argue that the brain drains can turn into brain gains. Consider Andrew Mountford, *Can a Brain Drain be Good for Growth in the Source Economy?*, 52 J of Developmental Econ 287 (1997).

²⁸ James Smith and Barry Edmonston, eds, *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration* 227, 230-35 (National Academy 1997) (discussing the impact of immigration on wages and consumer prices).

²⁹ Id at 153.

³⁰ See Steven A. Camarota, *Immigration's Effects on Jobs and Wages* 3, Center for Immigration Studies (December 1999), available at <<http://www.cis.org/articles/1999/combinednrc.pdf>> (last visited June 18, 2007).

³¹ World Bank, *Migration Can Deliver Welfare Gains, Reduce Poverty, Says Global Economic Prospects 2006*, (Nov 16, 2005), available at <<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/0,,contentMDK:20724214~menuPK:2643747~pagePK:64020865~piPK:149114~theSitePK:336992,00.html>> (last visited Apr 14,

vate sector should consider the option of introducing carefully designed temporary migration programs.”³²

There are more guest workers and guest worker programs than ever before and, if these recommendations are followed, we can expect a new age of guest worker programs. Many governments, however, are wary of guest workers, since experience has shown that there is nothing more permanent than temporary workers.³³ Understanding why guest worker programs get larger and last longer than anticipated is a prerequisite to designing programs that can come closer to fulfilling the goal of adding workers temporarily to the labor force but not adding settlers to the population.

I. DISTORTION AND DEPENDENCE

Guest worker programs tend to get larger and to last longer than anticipated because of distortion and dependence. Most employers in host countries do not hire guest workers. Distortion means that those who do often assume migrants will continue to be available, and some employers make investment decisions that reflect this assumption. As a result, farmers may plant fruit trees in areas with few people, assert that they will go out of business without migrants to pick their crops, and resist efforts to reduce the number of guest workers because such a reduction would reduce the value of their investment. If governments nonetheless reduce or end guest worker programs, illegal migration may rise as migrants seek available jobs formerly occupied by guest workers.

Dependence reflects the fact that some migrants and their families, as well as residents of their regions and countries of origin, may assume that foreign jobs, earnings, and remittances will continue to be available, and thus make investments such as buying or building housing that reflect this assumption. If the opportunity to work abroad is curbed, migrants may migrate illegally to avoid reductions in their incomes and a loss of assets.

2007).

³² Global Commission on International Migration, *Migration in an interconnected world: New directions for action* 79 (2005), available at <<http://www.gcim.org/attachements/gcim-complete-report-2005.pdf>> (last visited Apr 10, 2007). The GEP cautioned that foreign jobs and remittances “should not be viewed as a substitute for economic development in the origin country as ultimately, development depends on sound domestic economic policies.”

³³ Philip Martin, Manolo Abella and Christiane Kuptsch, *Managing Labor Migration in the Twenty-First Century* 125–29 (Yale 2006).

Most researchers conclude that the 1942–64 Bracero programs sowed the seeds of subsequent unauthorized Mexico-United States migration via distortion in rural America and dependence in rural Mexico.³⁴

Distortion and dependence should make governments cautious about launching new guest worker programs to “get control” of illegal migration, and should make such programs a last, rather than a first, resort. If guest worker programs are introduced, they should include economic mechanisms to minimize distortion and dependence, such as taxes to encourage employers to look for alternatives to migrants and subsidies to encourage guest workers to return to their countries of origin as their contracts require.

Dealing with distortion requires recognition that employers always have choices in making investments and filling jobs. By the time the government gets involved, employers have usually found the migrants they want to hire, so that undergoing the usual supervised period of recruitment to seek local workers almost always fails to find any. Government employment services are ill-suited to second-guess employers who find local workers unqualified; if worker advocates sue, arguing that guest workers are not needed or that local workers were passed over, the labor certification process can become contentious.

Furthermore, once employers learn how to have their “need” for guest workers certified, for example, by writing job descriptions that will not produce many local applicants, most assume they will continue to be able to hire foreign workers. As a result, investments in alternatives to migrants wither, and distortions increase as migrant-dependent sectors become isolated from national labor markets. Networks soon cross borders, and current migrants refer friends and relatives to fill vacant jobs. As a result, labor market information may flow far more freely from a

³⁴ Douglas S. Massey and Zai Liang, *The long-term consequences of a temporary worker program: The U.S. Bracero Experience*, 8 *Population Rsrch & Pol Rev* 199, 200 (1989) (noting that the “Bracero Program was not temporary” because immigration is “inherently dynamic and social” and that immigration “does not cease when labor recruitment ends”); Elizabeth Fussell and Douglas S. Massey, *The Limits to Cumulative Causation: International Migration From Mexican Urban Areas*, 41 *Demography* 151 (2004) (arguing that patterns of migration from urban areas are distinct from the more commonly-studied rural area migrations of Mexico, namely in that the former do not accord with the “principle mechanisms of cumulative causation,” while the latter do). See Consider Douglas S. Massey, et al, *Return to Aztlan: The Social Process of International Migration from Western* (California 1987).

migrant workplace to the migrant's country of origin than to pockets of unemployed workers nearby in the receiving country.

International norms and local laws call for migrant workers to be treated equally,³⁵ with the same wages and benefits as local workers. One way to minimize distortion is to realize that payroll taxes for social security and unemployment and other insurance add 20 to 40 percent to wages.³⁶ These taxes should be collected on migrant wages to level the playing field between migrant and local workers, but in most cases guest workers are not eligible for the benefits financed by the taxes. If the employer share of payroll taxes were used to combat distortion by supporting labor-saving mechanization or restructuring jobs to reduce the need for migrants over time, governments could restore or maintain employer interest in alternatives to migrants. For example, in an industry such as agriculture, it is often hard for one farmer to finance or implement mechanization, since peach packers and processors want either hand or mechanically-picked fruit, but not both, so a mechanization program funded by payroll taxes and encouraged by government may be needed to help shape alternatives to migrants.³⁷

The other half of the equation is giving migrants incentives to abide by the terms of their contracts, which usually require departure when jobs end or a time limit is reached. Guest workers can be given unique tax-reporting numbers, and the worker's share of payroll taxes could be refunded when the migrant surrenders his or her work visa in the country of origin. Given the global interest in using remittances to hasten development, as reflected in the United Nations's High-Level Dialogue in September 2006, governments and development institutions could

³⁵ See, for example, ILO Conventions 97, Article 6 ("[e]ach member . . . undertakes to apply . . . to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals" in respect to certain enumerated examples) and 143 (supplemental migrant labor protection provisions), available at <<http://www.ilo.org/ilolex/english/convdisp1.htm>> (last visited Apr 15, 2007).

³⁶ Organisation for Economic Co-operation and Development, *Benefits and Wages: OECD Indicators* (2004), available at <http://www.oecd.org/document/28/0,2340,en_2649_34633_34000860_1_1_1_1,00.html> (last visited Apr 15, 2007). See also *Society at a Glance: OECD Social Indicators 2006 Edition* 61, table SS5 (OECD 2007).

³⁷ Consider Philip Martin, *Promise Unfulfilled: Unions, Immigration, and Farm Workers* § 8 (Cornell 2003). Mechanization is not the only option to reduce dependence on migrants over time. In some cases, local workers may be attracted to "migrant jobs" after they are restructured, as when a central agent or hiring hall deploys workers to fill seasonal or part-time jobs more efficiently than the current decentralized system that relies on labor contractors. To recognize that each sector is different, boards representing employers, workers, and government could decide how to spend the accumulated funds to reduce dependence on guest workers over time. *Id.*

match these payroll tax refunds to support projects that create jobs in the migrants' home areas.³⁸

Minimizing distortion and dependence with taxes and subsidies will not yield the desired effects if unauthorized workers are readily available and labor laws are not enforced. Some employers hire unauthorized workers to save payroll taxes, and migrants established abroad will resist returning when their work visas expire despite refunds if they perceive that more opportunities exist abroad. Thus, enforcement of other immigration and labor laws is a prerequisite to guest worker programs that avoid distortion and dependence.

II. AMERICAN AND GERMAN EXPERIENCES

Illegal migration was not a concern when the United States and Germany began guest worker programs over a half century ago. During the 1940s, United States government employees recruited Mexicans to work in the United States, and during the 1960s, Germany's employment service established branches abroad to recruit migrants to work in Germany.³⁹ Once migrant networks were established, however, the flow of guest workers took on a life of its own, demonstrating that it is far easier to start than to stop labor migration.

In both the U.S. and Germany, the timing and nature of the benefits and costs of guest workers favored importing workers.

38

Participants acknowledged that remittances were the most tangible benefit of international migration for countries of origin. They noted that the volume of remittances had increased markedly in recent years. While remittances benefited millions of families of migrants, participants believed that their development potential could be enhanced by appropriate measures. These encompassed increasing competition among money-transfer companies and banks to reduce transfer fees, improving the access to banking services, including credit, of migrants and their families and expanding financial literacy in countries of origin. There was consensus that remittances were private flows and should not be considered a substitute for official development assistance, direct foreign investment or debt relief. Some participants warned about the potentially negative consequences of remittances, including the culture of dependency that they might foster at both the household and national levels.

United Nations, *Summary of the High Level Dialogue on International Migration & Development* 3 (Oct 13, 2006).

³⁹ Philip L. Martin, *The United States: The Continuing Immigration Debate*, in Wayne A. Cornelius, et al, eds, *Controlling Immigration: A Global Perspective* 51, 58 (Stanford 2004); Philip L. Martin, *Germany: Managing Migration in the Twenty-First Century* in Cornelius, *Controlling Immigration* (discussing the Employment Service offices, and describing migrant recruitment at the Istanbul office in particular).

The benefits of guest worker programs are immediate and measurable in economic terms in the sense that migrants arrive and fill vacant jobs; these benefits are concentrated among employers who hire them as well as among complementary workers and some consumers. The costs of guest workers tend to be deferred, harder to measure, and diffuse, such as when migrants unify their families, settle, and introduce diversity, which some natives may see as a cost and others as a benefit.

A. United States Braceros

The 35.7 million foreign-born residents in the United States in 2004 were about 12 percent of residents.⁴⁰ They included 31 percent naturalized U.S. citizens, 39 percent legal immigrants and nonimmigrants such as foreign students and legal temporary workers, and 30 percent unauthorized foreigners.⁴¹ The stock of unauthorized foreigners rose by an estimated 4.4 million between 2000 and 2005, by an average of 880,000 a year.⁴² By comparison, 706,000 legal immigrants were admitted in 2003.⁴³

About 57 percent of unauthorized foreigners in the United States were born in Mexico, as were 30 percent of the legal immigrants.⁴⁴ The roots of this large-scale Mexico-U.S. migration were planted during Bracero ("strong arm") guest worker programs begun in war time, in 1917 and again in 1942.⁴⁵ Each of these Bracero programs reached its peak in peacetime, in 1920 and 1956, before being terminated unilaterally by the United States.⁴⁶ The Bracero program shows how distortion and dependence can lead to subsequent illegal migration, and it also shows the failure of U.S. farmers to predict what would happen without Bracero workers.

⁴⁰ Jeffrey S. Passel, *Estimates of the Size and Characteristics of the Undocumented Population* 7 (Pew Hispanic Center 2005), available at <<http://pewhispanic.org/files/reports/44.pdf>> (last visited Feb 6 2007).

⁴¹ *Id.*

⁴² *Id.* at 2.

⁴³ Department of Homeland Security, *2003 Yearbook of Immigration Statistics*, available at <<http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2003/table01.xls>> (last visited June 18, 2003).

⁴⁴ Passel, *Estimates* at 2 (cited in note 40).

⁴⁵ Massey and Liang, *Long Term Consequences* 8 *Population Rsrch & Pol Rev* at 200 (noting that "several observers have argued that it ultimately encouraged a larger and more permanent migration to the United States") (citations omitted) (cited in note 34).

⁴⁶ Otey M. Scruggs, *Evolution of the Mexican Farm Labor Agreement of 1942* Vol 34, No 3 *Agricultural History* 142 (1960).

The second Bracero program began in 1942, just after John Steinbeck's 1939 novel *The Grapes of Wrath*⁴⁷ was published. The book gave an emotional impetus to the call for reform of the farm labor system, particularly in the southwestern states that depended on armies of seasonal workers who had no other U.S. job options because of discrimination (as with the Chinese) or lack of language and skills (as with the Japanese, Okies, and Arkies).⁴⁸ However, with crop losses possible in 1942, domestic opposition to Mexican workers was overcome, and Braceros began to trickle into the United States. Bracero admissions during WWII peaked at 62,000 in 1944.⁴⁹ The United States had over four million hired farm workers in 1944, making Braceros less than 2 percent of U.S. farm workers.⁵⁰

During the 1942–47 Bracero program, the U.S. government guaranteed contracts signed by migrants and farmers, a provision demanded by Mexico because of problems with nonpayment of wages in the World War I program to workers who went through the Mexican sources.⁵¹ After 1947, farmers could contract individually with Braceros. This change prompted widespread illegal migration as Mexicans avoided paying bribes in Mexico to get on recruitment lists and U.S. farmers avoided having to pay the cost of transportation from the place of recruitment to the place of work by hiring workers who showed up at the worksite.⁵²

⁴⁷ John Steinbeck, *The Grapes of Wrath* (Viking 1939).

⁴⁸ Martin, *Promise Unfulfilled* at 43–46 (cited in note 37).

⁴⁹ Id at 45.

⁵⁰ *Temporary Worker Programs: Background and Issues*, 96th Cong, 2d Sess 42, 31 (1980). In addition to Braceros, prisoners of war, interned Japanese, and state and local prisoners “supplemented” the U.S. hired farm work force, sending an unmistakable signal: to get ahead in the U.S. labor market, ambitious young Americans had to get out of farm work, which was relatively easy to do during World War II. Consider Martin, *Promise Unfulfilled* (cited in note 37).

⁵¹ See Rural Migration News, Braceros: History, Compensation, 12 Rural Migration News 2 (Apr 2006), available at <http://migration.ucdavis.edu/rmn/more.php?id=1112_0_4_0> (last visited Feb 6, 2007). To ensure that Braceros had some savings from their U.S. work, 10 percent of Bracero earnings between 1942 and 1947 were sent by farmers to a U.S. bank and transferred to a Mexican bank. Id. These forced savings often disappeared in Mexico, prompting suits four decades after the last Bracero entered the U.S. for hundreds of millions of dollars. Id. The Mexican government in 2005 established a \$25 million fund to provide up to \$3,500 to ex-Braceros and their relatives who registered with proof that they worked as Braceros. As of March 2006, some 250,000 people had registered, suggesting up to \$875 million in payouts. Id. See also Scruggs Evolution at 147–48 (cited in note 46).

⁵² *Temporary Worker Programs: Background and Issues* at 31 (cited in note 50) (noting the problem and recommending that “[n]o employer . . . should be permitted to contract directly with foreign workers for employment in the United States”).

The U.S. government encouraged illegal migration and employment by legalizing illegal Mexican farm workers found on U.S. farms in a process that official U.S. government publications called “drying out the wetbacks.”⁵³ This involved taking unauthorized farm workers found inside the U.S. to the Mexico-U.S. border, issuing them documents, and returning the now-legal Braceros to the farm on which they were found.⁵⁴ There were no penalties on farmers for knowingly hiring unauthorized workers, and the number of “wetbacks” soon exceeded the number of legally admitted Braceros.⁵⁵ In 1949, for example, about 20,000 Mexicans received contracts from U.S. employers to cross the border as guest workers, and over 87,000 arrived illegally in the United States and had their status legalized.⁵⁶

Rising illegal migration had several consequences. A Presidential Commission in 1951 recommended that the number of Braceros be reduced over time, concluding that their presence was adversely affecting U.S. farm workers⁵⁷; the Commission also recommended that the U.S. government introduce sanctions for employers who knowingly hire illegal workers, a recommendation supported by President Truman and the Mexican government. However, United States farmers used the outbreak of the Korean War in 1951 to persuade Congress⁵⁸ to instead approve a new Bracero program that had fewer employer obligations,⁵⁹ while the Immigration and Nationality Act of 1952⁶⁰ in-

⁵³ President's Commission on Migratory Labor, *Migratory Labor in American Agriculture*, 52-54 (1951).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Temporary Worker Programs: Background and Issues* at 31 (cited in note 50).

⁵⁷ President's Commission on Migratory Labor, *Migratory Labor in American Agriculture: Report of the President's Commission on Migratory Labor* at 59 (“It is our conclusion that the evidence demonstrates that the agencies of Government responsible for importing and contracting foreign labor have not been successful in protecting domestic farm labor from detrimental effects of imported contract alien labor. We find alien labor has depressed farm wages and, therefore, has been detrimental to domestic labor.”) (cited in note 53).

⁵⁸ Farmers used arguments that have a familiar ring. Americans did not want to fill seasonal farm jobs because welfare benefits gave them better options, a new Bracero program would benefit Mexico and reduce illegal migration, and as price-takers, farmers were in no position to raise wages in order to try to attract U.S. workers. Consider Ellis W. Hawley, *The Politics of the Mexican Labor Issue*, 40 *Agr Hist* 157 (1966) (demonstrating how, “[i]n defiance of all logic, [farmers] have been able for long periods of time to maintain special programs that benefit only a tiny segment of American agriculture”).

⁵⁹ An Act to Amend the Agricultural Act of 1949, Pub L 82-78, 65 Stat 119 (1951).

⁶⁰ Immigration and Nationality Act of 1952, Pub L 82-414, § 274, 66 Stat 163, 229 (1952), codified at 8 USC § 1101 et seq, amended by Immigration Reform and Control Act of 1986, Pub L 99-603, § 112, 100 Stat 3359, 3381-82 (1986).

cluded the Texas Proviso, which made harboring illegal aliens a crime punishable by a fine of up to \$2,000 and a prison term of up to five years, but specifically excluded employing illegal workers from the definition of harboring.⁶¹

The Bracero program expanded in the 1950s, when federal and state irrigation projects opened new land for farming in the southwest,⁶² the cost of shipping produce by truck to the east coast fell with the completion of the interstate highway system, and the baby boom increased the demand for fruits and vegetables. Bracero admissions peaked at 445,197 in 1956, after "Operation Wetback" removed over a million unauthorized foreigners and the U.S. Department of Labor relaxed its enforcement of the wage and housing regulations aimed at protecting Braceros.⁶³ Western farmers assumed that Braceros would continue to be available, and made business decisions reflecting this assumption, including planting more acres of fruits and vegetables.⁶⁴ The result was a sharp rise in land prices in California, as the state replaced New Jersey as the U.S. garden state.⁶⁵

During the late 1950s, in response to union and church complaints of ill-treatment of Braceros and adverse effects of Braceros on U.S. workers,⁶⁶ the U.S. Department of Labor ("DOL") began to more aggressively enforce labor laws.⁶⁷ DOL reports documented the fact that Braceros had been used illegally to undermine strikes called by U.S. workers.⁶⁸ President Kennedy agreed with critics that Braceros were adversely affect-

⁶¹ 8 USC § 1324(a) (1982) (This provision was subsequently amended and no longer includes the employment exception.).

⁶² Alan L. Olmstead and Paul W. Rhode, *The Evolution of California Agriculture, 1850-2000*, in Jerry Siebert, ed, *California Agriculture: Dimensions and Issues* 16-17 (Giannini Foundation), available at <<http://giannini.ucop.edu/CalAgbook.htm>> (last visited July 22, 2007).

⁶³ *Temporary Worker Programs: Background and Issues* at 35 (cited in note 50).

⁶⁴ See generally Alan L. Olmstead and Paul W. Rhode, *The Evolution of California Agriculture, 1850-2000* and Warren E. Johnston, *Cross Sections of a Diverse Agriculture: Profiles of California's Agricultural Production Regions and Principal Commodities*, in Jerry Siebert, Ed., *California Agriculture* (cited in note 62).

⁶⁵ *Id.*

⁶⁶ See Ellis W. Hawley, *The Politics of the Mexican Labor Issue* at 172 (cited in note 58).

⁶⁷ *Id.*

⁶⁸ See United States Department of Labor, Mexican Farm Labor Program, Consultants Report 272 (1959), reprinted in *Extension of Mexican Farm Labor Program: Hearings on S. 1466, S. 1945, and H.R. 2010 before a Subcommittee on Agriculture and Forestry*, 87th Cong, 1st Sess, 272 (1961) ("Knowledge of the availability of Mexican nationals weakens the domestic workers' bargaining position and contributes to the depression of area wage levels.").

ing United States Hispanics and proposed that the program be ended in 1963.⁶⁹ This set the stage for often emotional hearings on Braceros during the summer of 1963, with witnesses arguing that Bracero workers were necessary to keep fruit and vegetable prices “reasonable” and to help the U.S. maintain “food security” during the Cold War.⁷⁰

The Bracero program was nonetheless terminated, and predictions of what would happen without Braceros proved to be false. The processing tomato crop figured prominently in the debates over whether to continue the Bracero program, since 86 percent of the 44,000 peak harvest workers employed to pick the 2.2 million ton processing tomato crop in California were Braceros.⁷¹ Contrary to expectations, the harvest was mechanized rapidly in the mid-1960s, as plant scientists and engineers collaborated to develop tomatoes that ripened simultaneously and a machine was developed to cut and shake ripe tomatoes from the plants.⁷² Within a decade after the Bracero program ended, fewer than 8000 workers rode machines to sort far more than twice as many tomatoes than were picked by Bracero and American farmworkers.⁷³

Mexico-U.S. migration was relatively low between the end of the Bracero program and peso devaluations in the late 1970s, producing a “golden age” for U.S. farm workers. Cesar Chavez and the United Farm Workers (“UFW”) won a 40 percent wage increase for grape pickers in 1966, increasing entry-level wages from \$1.25 to \$1.75 an hour plus 25 cents a box at a time when the federal minimum wage was \$1.25, in part because Bracero replacement workers were not available.⁷⁴ The grape boycott put Chavez on the cover of *Time* in 1969, when most large California fruit and vegetable growers had contracts with unions or offered union-like wages and benefits.⁷⁵ By 1975, California farm worker unions were strong enough to persuade the Legislature to enact the Agricultural Labor Relations Act, considered even more fa-

⁶⁹ *Temporary Worker Programs: Background and Issues* at 52–53 (cited in note 50).

⁷⁰ See Hawley, *The Politics of the Mexican Labor Issue* at 174–76 (cited in note 58).

⁷¹ Philip L. Martin and Alan L. Olmstead, *The Agricultural Mechanization Controversy*, 227 *Sci* 4687, 601 (Feb 1985).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Martin, *Promise Unfulfilled* at 67–68 (cited in note 37).

⁷⁵ *Time* (July 4, 1969), available at <<http://www.time.com/time/covers/0,16641,19690704,00.html>> (last visited Feb 9, 2007).

vorable to workers and unions than the National Labor Relations Act.⁷⁶

The golden era for farm workers came to an end in the early 1980s. During a period of high inflation in 1979, when the federal minimum wage was \$3.35, the UFW called strikes in support of another 40 percent wage increase, in a bid to raise the entry-level wages on farms with union contracts from \$3.75 to \$5.25 an hour.⁷⁷ Mexico had just discovered oil, and the Mexican government went on a spending spree that discouraged emigration. Many multinationals that bought farm land as an inflation hedge in the 1970s, and had brand names vulnerable to boycotts, reluctantly agreed to raise wages.⁷⁸ However, the Mexican economy and peso crashed in 1982 and labor contractors hiring unauthorized Mexicans soon replaced unionized farm workers. The UFW claimed 70,000 members in the early 1970s, but had fewer than 7,000 a decade later as unionized farms went out of business.⁷⁹

The distortion due to Braceros was evident in the expansion of labor-intensive agriculture in California, far from the consumers of the fruits and vegetables produced. When the influx of Braceros ended in the mid-1960s, there was widespread mechanization, belying assertions that, if labor-saving machines could have been used when Braceros were available, they would have been. Dependence was evident in Mexico, where the government neglected rural areas, driving workers to emigrate to the United States. After the Bracero program ended, Mexico and the United States agreed to make exceptions to their trade laws to allow

⁷⁶ Alatorre-Senovich-Dunlap-Berman Agricultural Labor Relations Act of 1975, Cal Labor Code §§ 1140–1166.3. Farm workers remain excluded from the federal National Labor Relations Act, which grants union rights to most private sector workers. See 29 USC §§ 151–69.

⁷⁷ These negotiations are described in Martin, *Promise Unfulfilled* at 74–75 (cited in note 37). Consider Philip L. Martin, *Imperial Valley: Agriculture and Farm Labor* (unpublished manuscript), available at <http://migration.ucdavis.edu/cf/more.php?id=34_0_2_0> (last visited Apr 15, 2007).

⁷⁸ See, for example, Sun-Harvest, the vegetable division of what is now Chiquita that went out of business in the early 1980s. Martin, *Promise Unfulfilled* at 74–75 (cited in note 37).

⁷⁹ LM-2 reports filed with the U.S. Department of Labor, available at <<http://union-reports.dol.gov/olmsWeb/docs/index.html>> (last visited Apr 15, 2007).

maquiladora assembly plants⁸⁰ to create jobs for ex-Braceros who had moved there from the interior to be closer to their U.S. jobs.⁸¹

B. German Gastarbeiter

Germany's guest worker program also began with agriculture, when a 1955 agreement allowed German farmers to hire Italian migrant workers.⁸² The growing demand for labor during the *Wirtschaftswunder* (economic miracle) years, however, turned out to be in German factories, and construction sites.⁸³ By the early 1960s employers in these sectors received permission to hire migrants under bilateral agreements signed with seven non-European Community "recruitment countries": Greece, Morocco, Portugal, Spain, Tunisia, Turkey, and Yugoslavia.⁸⁴

There was no significant discussion of alternatives to recruiting guest workers for four major reasons. First, the German labor force was shrinking for demographic and social reasons, including a delayed baby boom that seemed to limit female labor force participation, expanded educational opportunities that kept more youth in school, and better pensions that prompted earlier retirements. Second, there was a reluctance to risk what was perceived to be a fragile postwar economic recovery by encouraging alternatives to foreign workers, such as allowing wages to rise to encourage labor-saving mechanization.⁸⁵ Unions did not oppose importing foreign workers after they secured a promise that Germans would be hired first and guest workers would receive equal wages and benefits.⁸⁶

⁸⁰ *Maquiladoras* are foreign-owned plants in Mexico that import components, assemble them into televisions, and re-export the finished goods. See Aureliano Gonzalez Baz, *Manufacturing in Mexico*, available at <<http://www.udel.edu/leipzig/texts2/vox128.htm>> (last visited July 22, 2007).

⁸¹ See Tony M. Ramirez, *The Maquiladora Industry: A Brief History*, available at <http://www.madeinmexicoinc.com/maquiladora_overview.htm> (last visited Apr 15, 2007).

⁸² Martin, *Germany: Managing Migration in the 21st Century* at 225 (cited in note 39).

⁸³ *Id.*

⁸⁴ *Id.* Greece became a member of the European Community ("EC") in 1981, and Spain and Portugal became members in 1986. Greeks had to wait seven years, until 1988, for full freedom of movement rights. Spain and Portugal, scheduled to have freedom of movement rights after seven years, in 1993, got mobility rights one year early in 1992.

⁸⁵ Martin, *Germany: Managing Migration in the Twenty-First Century* at 225–26 (cited in note 39). See generally, Charles Kindleberger, *Europe's Postwar Growth: The Role of Labor Supply* (Harvard 1967).

⁸⁶ Martin, *Germany: Managing Migration in the Twenty-First Century* at 225–26 (cited in note 39).

Third, unifying Europe was based on freedom of movement, meaning that after January 1, 1968, a European Economic Community/European Union ("EEC/EU") worker could leave his country, enter another EEC/EU country for up to three months in search of a job and, if he found a job, the host country was obliged to issue any needed work and residence permits.⁸⁷ Recruiting guest workers was thus encouraging a labor migration that would soon occur in any event. Fourth, Germany and other European nations had undervalued currencies in a world of fixed exchange rates during the 1960s, which made Europe a center for investment.⁸⁸ With \$1 buying 5DM when it "should have" bought 4DM, local and American capital was invested to build and expand factories to produce goods for domestic and export markets.⁸⁹ An undervalued exchange rate, combined with the flexibility of American multinationals, led a French writer to warn of *The American Challenge*⁹⁰ to Europe via United States investments.

The number of guest workers in Germany grew rapidly in the early 1960s.⁹¹ After a recession-induced dip in 1966–67, the number of guest workers climbed to a peak 2.6 million in 1973, when migrants were 12 percent of Germany's employed wage and salary workers.⁹² When first recruited, migrants received one-year work and residence permits.⁹³ These could be renewed for two years, and a first renewal brought the right to have family members join the migrant.⁹⁴ The next two-year renewal gave migrants permanent residence or immigrant rights, as foreigners with at least five years in Germany could not be removed if they lost their jobs or drew unemployment or welfare benefits.⁹⁵

⁸⁷ W.R. Böhring, *The Migration of Workers in the United Kingdom and the European Community* 15 (Oxford 1972).

⁸⁸ Martin, *Germany: Managing Migration in the Twenty-First Century* at 225 (cited in note 39).

⁸⁹ Id.

⁹⁰ Jean-Jacques Servan-Schreiber, *The American Challenge* xiii (Atheneum 1968) ("Starting with a rather matter-of-fact examination of American investment in Europe, we find an economic system that is in a state of collapse. It is our own. We see a foreign challenger breaking down the political and psychological framework of our societies. We are witnessing the prelude to our own historical bankruptcy.").

⁹¹ See Martin, *Germany: Managing Migration in the 21st Century* at 226–27 (cited in note 39).

⁹² Id. at 224.

⁹³ Id. at 227.

⁹⁴ See id. at 228.

⁹⁵ Martin, *Germany: Managing Migration in the Twenty-First Century* at 226–28 (cited in note 39).

The government and most Germans expected employers to send migrants home after a year on the assembly line or at the construction site, while sending-country governments assumed that migrants would be eager to return to their families with savings from their German jobs.⁹⁶ The jobs filled by migrants were year-round, however, and employers were reluctant to send home trained migrants and take their chances with new recruits.⁹⁷ Many migrants, on the other hand, soon preferred to take six-week vacations rather than give up jobs that paid wages five or six times higher than those at home and offered benefits as well.⁹⁸ Many employers wanted their migrant employees to stay longer,⁹⁹ so many did.

Even though many employers were becoming structurally dependent on migrants who were achieving immigrant status in “non-immigrant Germany,” researchers reinforced the position of the government that Germany was not a country of immigration. Their surveys found that most Turks and Yugoslavs planned to return eventually, citing the cold weather, high cost of living, and lack of integration.¹⁰⁰ The expectation that migrants would return, and the desire of many migrants to return, obviated integration policies. Instead, there were diverse state and local government efforts to deal with the migrant children who were assumed to be in Germany only temporarily. Some schools provided native-language instruction to make re-integration easier at home, while others offered German-language instruction in regular German classrooms.¹⁰¹

By the early 1970s, economists were beginning to warn of distortion, especially on the assembly lines staffed by migrants. They noted that Japanese auto manufacturers, whose requests for guest workers had been rejected, took the lead in developing assembly-line robots, while German manufacturers recruited more migrants. Meanwhile, the “fortune in small change” sent to the migrants’ areas of origin did more to improve housing and spread a desire for imported consumer goods than to foster stay-

⁹⁶ Id at 228–30.

⁹⁷ Id at 228–29.

⁹⁸ Id.

⁹⁹ Martin, *Germany: Managing Migration in the Twenty-First Century* at 229 (cited in note 39).

¹⁰⁰ Ursula Mehrländer, *Ausländerforschung 1965 bis 1980: Fragestellungen, theoretische Ansätze, empirische Ergebnisse*, (Neue Gesellschaft Bonn 1987).

¹⁰¹ Ursula Mehrländer, *Soziale Aspekte der Ausländerbeschäftigung*, (Verlag Neue Gesellschaft GmbH 1974).

at-home development. The queues of Turks registered to go abroad reached over a million by 1973.¹⁰²

There were warnings that labor migration to Germany risked getting "out of control,"¹⁰³ a sense reinforced by wildcat strikes involving migrants in the summer of 1973.¹⁰⁴ After the oil embargo threatened a recession and higher unemployment, the German government stopped the recruitment of non-EC, unskilled workers on November 23, 1973, and this recruitment stop remains in place today.¹⁰⁵ However, migrants who had been in Germany at least a year before they lost their jobs were eligible for unemployment benefits. Most realized that, if they left Germany, they would be unable to return.

With oil-induced recessions at home and abroad, most guest workers decided to settle in Germany and form or unite families. The result is clear in Figure 1. In 1973, two-thirds of the four million foreigners in Germany were employed; by 2000, only a quarter of the seven million foreigners in Germany were employed.

¹⁰² Philip L. Martin, *The Unfinished Story: Turkish Labour Migration to Western Europe, with Special Reference to the Federal Republic of Germany* 105 (Geneva 1991).

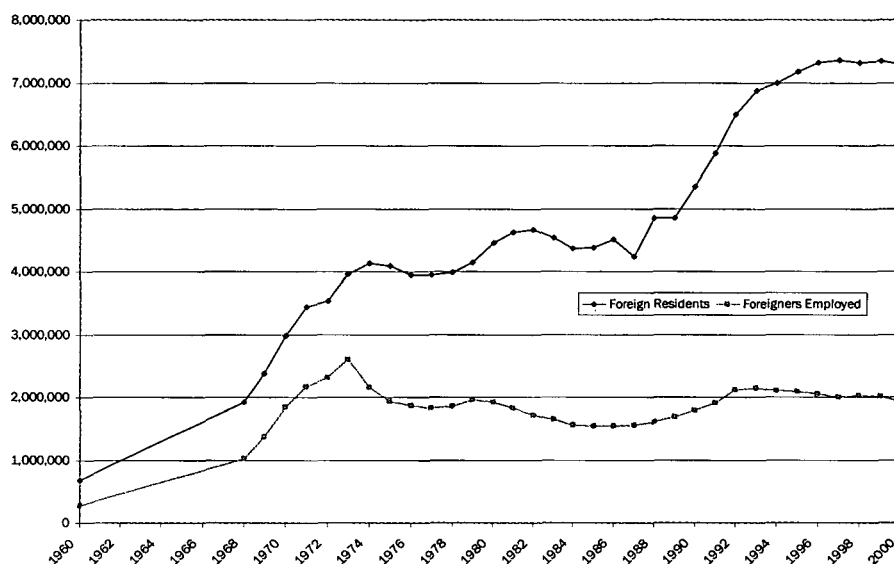
¹⁰³ Martin, *Germany: Managing Migration in the 21st Century* at 229 (cited in note 39).

¹⁰⁴ Id.

¹⁰⁵ Id. Anwerbestopp is the German term for recruitment stop.

Figure 1

Foreign Residents and Employed Foreigners in Germany, 1960–2000



III. CONTEMPORARY PROGRAMS

During the U.S. Bracero and German guest worker eras, there was one major program for admitting migrant workers. Today, the United States, Germany, and most other high-income countries have multiple programs to admit foreign workers via “front,” “side,” and “back doors.” Their dominant and recurring theme is straightforward: welcome skilled workers to settle and aim to rotate unskilled in and out of the country.

Front doors are for foreigners invited to settle. Most front-door immigrants arrive to join settled family members, and a smaller number are resettled because they face persecution at home.¹⁰⁶ Industrial countries also permit highly skilled or economic migrants to enter and settle with their families, with Australia, Canada, and the United Kingdom selecting economic migrants on a supply-side basis of personal characteristics such as age and education, and Germany and the United States selecting

¹⁰⁶ For U.S. data, see Philip L. Martin and Elizabeth Midgley, *Immigration: Shaping and Reshaping America*, 52 Population Reference Bureau 5 (2003) (showing that refugees formed just slightly more than 10% of documented immigrants in the United States).

economic migrants on a demand-side basis of having a job offer.¹⁰⁷ There has been convergence between points-based or supply-side selection systems and employer-based or demand-side selection systems, as Canada awards points to foreigners with job offers and the U.S. makes it easiest to get immigrant visas for college-educated foreigners.¹⁰⁸

Side-door migrants are admitted for a specific time and purpose that ranges from a few days for tourism to several years for work or study. Side doors were traditionally not linked explicitly to front-door settlement channels, as reflected in rules requiring foreign students to return to their country of origin upon graduation. This has changed, and most industrial countries now allow foreign student graduates to work after graduation and then settle, just as foreign professionals can enter as guest workers and later settle as immigrants.¹⁰⁹ Back-door migrants refers to foreigners who enter a country illegally as well as those who enter legally and violate the terms of their entry, as when a tourist goes to work. In the United States and southern European countries such as Italy and Spain, many of the foreigners who eventually wind up as immigrants arrive in illegal or quasi-legal status.¹¹⁰

The major change between past and current guest worker programs is in their scope and purpose. The older programs were macro in the sense that there was one major program per coun-

¹⁰⁷ See Martin, *Germany: Managing Migration in the 21st Century* at 222 (cited in note 39). In both Germany and the U.S., most immigrants admitted for economic reasons are selected by employers as the best candidates to fill vacant jobs if local workers are unavailable. See U.S. Citizenship and Immigration Services, *Immigration Through Employment*, available at <<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=84096138f898d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=4f719c7755cb9010VgnVCM10000045f3d6a1RCRD>> (last visited July 22, 2007).

¹⁰⁸ For an explanation of the Canadian system, see Citizenship and Immigration Canada, *Immigrating to Canada*, available at <<http://www.cic.gc.ca/english/immigrate/index.html>> (last visited Apr 15, 2007). For an explanation of the US system, see United States Citizenship and Immigration Services, *Lawful Permanent Residence ("Green Card")*, available at <<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=4f719c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextchannel=4f719c7755cb9010VgnVCM10000045f3d6a1RCRD>> (last visited Apr 15, 2007).

¹⁰⁹ See, for example, Philip L. Martin, Manolo Abella and Christiane Kuptsch, *Managing Labor Migration in the Twenty-First Century* § 3 (Yale 2006).

¹¹⁰ The share of immigrants admitted to the U.S. who were in the U.S. and adjusted status when their green cards became available rose from 52 percent in 2000 to 66 percent in 2005. United States Department of Homeland Security, *Table 6: Legal Permanent Resident Flow by Type and Major Class of Admission: Fiscal Years 1996 to 2005*, available at <<http://www.dhs.gov/ximgt/statistics/publications/LPR05.shtm>> (last visited Apr 15, 2007).

try, and the overall unemployment and job vacancy rate played determinative roles in decisions on the need for guest workers. Today's programs are micro, aiming to fill job vacancies for nurses, IT specialists, or farm workers¹¹¹; overall unemployment and job vacancy rates play little role in discussions about whether these particular types of workers are needed. Government employment services agencies, which have shrunk, have less authority to deny employer requests for migrants, and less credibility in finding local workers to fill job vacancies.¹¹²

Germany has gone from having one guest worker program to at least five today. The 1991 Aliens Act created new programs for non-EU seasonal workers, project-tied workers, trainees, border commuters, and nurses, each with different admissions criteria, wages, rights in Germany, and return arrangements.¹¹³ The new micro programs involve fewer foreign workers, but they also include conditions that make it hard for migrants to settle. For example, seasonal workers can stay a maximum eighty-nine days in Germany, while project-tied workers are considered employees in their country of origin, not in Germany, so their legal work and residence does not count toward the five years to immigrant status requirement.¹¹⁴

With contemporary guest worker programs admitting migrants at the top and bottom of the job ladder, and admissions procedures giving employers more authority to determine whether foreign workers are needed, employers have gained an important voice in admissions policy. In most industrial coun-

¹¹¹ See the United States Department of Labor, Employment and Administration's website for the different requirements for employers under various programs, available at <<http://www.foreignlaborcert.doleta.gov/>> (last visited Apr 15, 2007).

¹¹² For the limits on what DOL can do with employer attestations for H-1B workers, see The United States Governmental Accountability Office, *H-1B Visa Program: More Oversight by Labor Can Improve Compliance with Program Requirements* GAO-06-901T June 22, 2006, available at <www.gao.gov/docdb/summary.php?rptno=GAO-06-901T&accno=A55841> (visited Apr 15, 2007). In the U.S., there are two major ways of determining whether an employer "needs" migrants. Under certification, the US Department of Labor controls the border gate, not allowing migrants to enter until the employer conducts recruitment activities supervised by DOL. Under the alternative attestation process, the employer controls the border gate, opening it by attesting that she is paying the prevailing wage, and DOL responds to complaints of violations. Both are explained on the U.S. Department of Labor, Employment and Administration website (cited in note 111).

¹¹³ *Act concerning the Entry and Residence of Aliens in the Territory of the Federal Republic*, (1991), unofficial English translation available at <<http://www.unhcr.org/cgi-bin/texis/vtx/rsd/rsddocview.htm?tbl=RSDLEGAL&id=3ae6b55a0>> (last visited Feb 10, 2007). Consider Martin, *The Continuing Immigration Debate* (cited in note 39).

¹¹⁴ Consider Martin, *Germany: Managing Migration in the 21st Century* (cited in note 39).

tries, if an employer decides that a college-educated foreigner is the best person to fill a vacant job, the hiring and admission procedure is relatively straightforward. For example, H-1B visas in the U.S. are generally gone early in the fiscal year in part because most employers simply "attest" that they are paying at least the prevailing wage to a college-educated foreigner who is to fill a job normally requiring a college education; there are typically no investigations of employer assertions unless the government receives complaints.¹¹⁵

IV. NUMBERS VERSUS RIGHTS

As the world enters a new age of guest worker programs, there is little discussion of the difficult trade-off between the competing goods of migrant numbers and rights. The demand for migrant workers depends in part on their cost, which in turn depends in part on their rights. If migrants have the "full rights" laid out in International Labor Organization ("ILO") and United Nations ("UN") conventions, including the right to work-related benefits and family unification, their cost is typically higher and fewer are demanded by employers.¹¹⁶ On the other hand, fewer rights and lower costs can expand migrant numbers, but lead to a labor force in which different types of workers have different rights and costs to employers.

Most international discussions call for more numbers and rights; that is, more channels for legal guest workers to enter rich countries as well as full ILO and UN rights for migrants. Most countries receiving migrants have not ratified the ILO and UN migrant conventions,¹¹⁷ so in practice, this call for "more" migrant protections provides little guidance to deal with the trade-off in countries that do not ratify. For example, should guest workers be encouraged or discouraged in Gulf oil exporters that sharply restrict the rights of migrants? Migrants will likely earn more in Saudi Arabia or Kuwait than they would at home,

¹¹⁵ United States Governmental Accountability Office, *H-1B Visa Program: More Oversight by Labor Can Improve Compliance with Program Requirements* GAO-06-901T June 22, 2006, 1, available at <www.gao.gov/docdb/lite/summary.php?rptno=GAO-06-901T&accno=A55841> (last visited Apr 15, 2007).

¹¹⁶ See Michael Hasenau, *ILO Standards on Migrant Workers: The Fundamentals of the UN Convention and Their Genesis*, 25 Intl Migration 687, 688 (1991).

¹¹⁷ Ryszard Cholewinski notes that the ILO will not accept ratifications of its conventions with national reservations. See *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* 91 (Clarendon Press 1997) ("[N]o reservations may be made to [the ILO] Conventions.").

but there is no immediate prospect for equality between migrants and natives.

The presence of migrants in countries that restrict their rights demonstrates that many workers are willing to accept the trade-off of higher wages for fewer rights. The fact that many people pay large percentages of what they will earn to recruiters to obtain contracts to work abroad suggests that the international community may want to consider core migrant rights as well as more comprehensive migrant rights conventions.¹¹⁸

The fundamental dilemma is that inequality motivates migration, but migrant conventions and norms call for equality after arrival. This dilemma lies at the core of the World Trade Organization's ("WTO") General Agreement on Trade in Services ("GATS") negotiations, which aim to liberalize the movement of "service providers" which, if achieved, could lead to "hundreds of millions" of additional migrants.¹¹⁹ Services move over borders in four major modes. Mode one, cross-border supply occurs when the service rather than the supplier or consumer crosses national borders, as with call centers.¹²⁰ Mode two, consumption abroad occurs when the consumer travels to the supplier, as when a tourist visits another country or a patient travels abroad for medical services.¹²¹ Mode three, commercial presence reflects the movement of capital, as when a bank or insurance company establishes a subsidiary in another country. And Mode four, "movement of natural persons" involves the provider of a service traveling to the consumer.¹²²

In 2004, less than 1.5 percent of global trade in services involved Mode four.¹²³ Many developing countries would like to see more Mode four movements, with India leading a group of countries demanding, among other things, changes in industrial

¹¹⁸ Consider Christiane Kuptsch, ed, *Merchants of Labour* (ILO 2006).

¹¹⁹ In answer to the question, "Are we looking at tens of millions of people moving around in the future [under Mode four]," Abdel-Hamid Mamdouh, director of trade in services at the World Trade Organization ("WTO"), said "Ah, yes-it could be hundreds [of millions] if we liberalize." John Zarocostas, *Migration helps export services*, Washington Times A10 (Jan 3, 2005).

¹²⁰ See the explanation of the four modes at World Trade Organization, *The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines*, available at <http://www.wto.org/english/tratop_e/serv_e/serv_e/gatsqa_e.htm> (visited Apr 15, 2007).

¹²¹ Id.

¹²² Id.

¹²³ Oonagh Sands, *Temporary Movement of Labor Fuels GATS Debate*, available at <<http://www.migrationinformation.org/Feature/display.cfm?id=231>> (last visited July 22, 2007) (citing a 2003 study by L. Alan Winters, Terrie L. Walmsley, Zhen Kun Wang, and Roman Grynberg at the University of Sussex).

country policies that would open more doors for their nationals seeking to provide services.¹²⁴ The goal is a “GATS visa” that would allow nationals of member countries access to any other WTO member country;¹²⁵ refusal to allow entry and employment would be a reason to file a complaint with the WTO.

The numbers versus rights trade-off becomes clear when dealing with minimum wages for GATS service providers. ILO Conventions 97 and 143 call for wage parity between migrant and local workers.¹²⁶ Sumanta Chaudhuri and co-authors, however, assert that equal wages would limit numbers: “Wage-parity . . . is intended to provide a nondiscriminatory environment, [but] tends to erode the cost advantage of hiring foreigners and works like a de facto quota.”¹²⁷ Rupa Chanda goes further, asserting that wage parity requirements act to “negate the cost-based advantage of many developing countries in exporting labour-intensive services and works against the very concept of comparative advantage based on cost differentials.”¹²⁸ In other words, if GATS opened new channels for migrants, would they be paid local minimum wages, which may limit their numbers, or

¹²⁴ Sumanta Chaudhuri, Aaditya Matto, and Richard Self, *Moving People to Deliver Services: How Can the WTO help?*, 38 J World Trade 363 (2004); Benny Kuruvilla, *Services Industry Drives India GATS Negotiations*, Focus on the Global South (June 30, 2006), available at <<http://www.focusweb.org/services-industry-drives-india-gats-negotiations.html?Itemid=92>> (last visited June 21, 2007).

¹²⁵ Rupa Chanda, *Movement of Natural Persons and the GATS*, 24 World Economy 631–54, 648 (2001). See also National Foreign Trade Council, *The Doha Development Agenda and GATS Mode 4: Recommendations for Improved Rules on Temporary Global Mobility* 5 (2005), available at <http://www.wto.org/english/forums_e/ngo_e/posp46_nftc_e.pdf> (last visited June 21, 2007).

¹²⁶ ILO Convention 97, *Migration for Employment Convention* (1949), available at <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C097>> (last visited Feb 11, 2007); ILO Convention 134, *Migrant Workers (Supplementary Provisions) Convention* Art 10 (1975), available at <<http://www.ilo.org/ilolex/english/convdisp1.htm>> (last visited Feb 11, 2007):

Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.

Id.

¹²⁷ Chaudhuri, Matto, and Self, *Moving People to Deliver Services: How can the WTO help?* at 365–66 (cited in note 124).

¹²⁸ Rupa Chanda, *Movement and Presence of Natural Person and Developing Countries: Issues and Proposals for the GATS Negotiations*, 29 S Centre Working Paper 9–10 (South Centre 2004).

could they work for lower-than-minimum wages, which would presumably increase numbers?

Numbers versus rights raises other questions as well. Martin Ruhs emphasizes that “[i]t is a human right to leave one’s country, but there is no corresponding right to enter another country.”¹²⁹ As a result, the balance of power in determining whether numbers or rights gets higher priority lies mostly in the richer migrant-receiving countries, which have to answer questions such as whether to enforce the return of skilled migrants to avoid brain drain from sending countries or welcome them to generate the maximum benefits from immigration. Sending countries largely react to these policies, making decisions about whether to facilitate labor emigration or attempt to ban migration to particular countries.

CONCLUSIONS

Guest worker programs move workers from one country to another. Economic theory suggests that workers moving from lower to higher wage countries are the major beneficiaries of such programs, but they increase global economic efficiency, making labor migration a “natural component” of globalization that integrates markets.

Governments with large numbers of unauthorized foreign workers often see guest worker programs as the best compromise between the extremes of no borders and no migrants. The arguments for having legal guest workers rather than unauthorized foreigners seem compelling. Employers argue they cannot find local workers to fill vacant jobs at prevailing wages and working conditions, and many migrants want to work abroad for higher wages. With worries about integrating second- and third-generation foreigners, governments find much appeal in “borrowing” workers from lower-wage countries.

The new era of guest worker programs can anticipate and deal with the distortion and dependence that caused earlier programs to end under a cloud. Recognizing that economic incentives can reinforce program rules and including these incentives in twenty-first-century guest worker programs can help ensure that guest workers do not become permanent features of the landscape in sending and receiving countries.

¹²⁹ Martin Ruhs, *Designing Viable and Ethical Labor Immigration Policies*, *World Migration* 209 (Intl Org for Migration 2005).

Well-managed guest worker programs benefit migrants and receiving countries, but it is less clear that sending countries benefit from recruitment, remittances, and returns. The ILO reviewed the migration and development literature and concluded that "migration can contribute positively to development where a country is already poised to develop; it cannot, however, create such a condition."¹³⁰ The World Bank similarly asserts that "migration should not be viewed as a substitute for economic development in the origin country—development ultimately depends on sound domestic economic policies."¹³¹

There are several conflicts of interest between receivers and senders. Receiving countries prefer the best and brightest workers, such as IT and health care professionals, not the unemployed and unskilled. The professionals earn more and can remit more, but may also find it easier to settle abroad, which likely reduces remittances. It is not yet clear whether the advice being given to developing countries—don't worry if your best and brightest leave because you will get remittances—will eventually be as discredited as the advice of a half-century ago from international development institutions to speed up development by creating and protecting basic steel and other industries from international trade.¹³²

The governments and international institutions advocating more guest worker programs have not dealt with the fundamental dilemma that inequality motivates people to move, but most norms call for equal treatment after arrival. Countries in which the equality norm is ignored have the most migrants, as in the Middle East, while countries that adhere to the equality norm have fewer, as in Scandinavia. There are no easy or universal answers as to whether numbers or rights should get higher priority, but one way forward is to think in terms of core rights that all migrants should enjoy.

¹³⁰ International Labor Office, *Towards a Fair Deal for Migrant Workers in the Global Economy*, International Labour Conference, 92nd Session, Report VI, available at <<http://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/rep-vi.pdf>> (last visited June 21, 2007).

¹³¹ World Bank, *Global Economic Prospects* at xi (cited in note 31).

¹³² For reviews of these policies, see Sandra Blanco, *The 1960s and 1970s: The World Bank Attacks Poverty; Developing Countries Attack the IMF*, available at <<http://www.uiowa.edu/iefdebook/ebook2/contents/part1-IV.shtml>> (last visited June 21, 2007) (World Bank lending created the infrastructure for import-substitution manufacturing). See also Felipe Pazos, *Have Import Substitution Policies Either Precipitated or Aggravated the Debt Crisis?* 27 No 4 Journal of Interamerican Studies and World Affairs, 57–73 (Winter 1985–1986) (Latin American countries thought they could create jobs for ex-farmers only by industrializing).

